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That this Court's denial of certiorari in this instance overlooks that the results that waiver of petitioners' rights will produce in this case are so contrary to the public policy of Chapter X of The Bankruptcy Act and so unconscionable that, after a clear and unequivocal denial of any intent to waive these rights was made and argued in open court before any change in position was made, a Chapter X Court as a Court of Equity would be in abuse of its discretion to order specific enforcement of waiver, and a Circuit Court in error to uphold this action 2

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IN THE

Supreme Court of the United States

OCTOBER TERM 1966

No. 1165

JOHN K. CALHOUN, Individually and as Attorney for the ESTATE OF C. F. CALHOUN

Petitioners

vs.

CHARLES C. HERTWIG, Trustee, Et Al,

Respondents

The Petition of John K. Calhoun, et al, for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

---

PETITION FOR RE-HEARING

Comes now, JOHN CALHOUN to petition for re-hearing of this Court's order dated May 8, 1967, denying his petition for writ of certiorari and for grounds, shows:

GROUND ONE

That this Court's denial of certiorari in this instance overlooks that the results that waiver of petitioners' rights will produce in this case are so contrary to the public policy of Chapter X of The Bankruptcy Act and so unconscionable that, after a clear and unequivocal denial of any intent to waive these rights was made and argued in open court before any change in position was made, a Chapter X Court as a Court of Equity would be in abuse of its discretion to order specific enforcement of waiver, and a Circuit Court in error to uphold this action.

The enforcement of waiver of petitioners' section 643 right is solely for the benefit of the controlling stockholders who under the plan shall profit to the exact extent of petitioners' loss by way of their entitlement to refund of any of the $56,000.00 now in the Trustee after the payment of all claims and all other fees and expenses.

Yet, these controlling stockholders occupy the position of the parent corporation in *Taylor v. Standard Gas & Electric Co.*, 306 U.S. 307, 59 S.Ct. 543, 83 L.Ed. 669. Den-Nap is in the position here that the subsidiary, Deep Rock, was in the *Taylor* case.

Here the controlling stockholders have taken $3,750,000.00[1] from Den Nap's 1950-1960 gross of only $10,000,000.00 via their Precision instrumentality and

[1]Record Vol. I, page 272, all figures of which may be verified from original reports of audits found in the Red Leather Bound Volume in the Record as an Exhibit to the Extraordinary Motion in the Circuit Court, which came forward from the Clerk of the Circuit Court separately, and is now in the Supreme Court.

their patent royalty contracts as depicted in Exhibit A attached.[2] In the *Taylor* case, the controlling parent took only $9,350,000.00 of Deep-Rock's $52,000,000.00 1919-1933 gross (59 S.Ct., at 545, right hand column). The "taking" from Den-Nap was roughly twice as harmful as that in the *Taylor* case where this Court intervened to prevent injustice to the independent minority stockholders who were preferred.

This Den-Nap operation represents a new but much used pattern *"of* (the) *spoliation . . . and faithless stewardship"* that *Taylor* speaks about, which very much merits the attention of this Court. Using parent corporations for control of subsidiaries to be milked is no longer *safe* or *popular.*

The new and wide-spread practice is for controlling stockholders to use a group of three or more corporations from one state, each of which is at all times insolvent, because the real assets and income of the entire group of corporations are concealed in an out-of-state corporation solely owned by the controlling stockholders alone. The out-of-state corporation holds the in-state group in *de facto peonage,* by contracts and other devices.

Look for a moment through the eyes of Judge Bootle as he discovered, three years late, the way it was done in this case.

Judge W. A. Bootle took this Chapter X in early 1961, but found out for the first time at the hearing of February 17, 1964[3] that a $1,000,000.00 asset in this reorgani-

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[2]Record Vol. I, page 299, also.

[3]Record Exhibit A to Extraordinary Motion for Rehearing in Circuit Court in Record Supplement forwarded separately from

zation called "Den-Air" was carried on the corporate audits in the proceedings at $4,417.00,[4] and that the earnings of this "Den-Air" entity had been completely concealed for three years in Chapter X.

We quote from pages 35-39 of these minutes.[3]

> "MR. CALHOUN: Could we find out from Mr. Fourcher whether this statement is a consolidated statement setting out Den-Air's profits or whether it is merely — you see, as long as you keep Den-Air on Precision's books as a wholly owned subsidiary at the value of the stock then what Den-Air makes, or the increase in Den-Air's net worth does not show on Precision's statement.
>
> "THE COURT: Den-Air is owned solely by Precision?
>
> "MR. CALHOUN: Yes, sir, as I understand it.
>
> "THE COURT: I don't believe the statements

Circuit Court on February 15, 1967. Also, Record Vol. II, falling after page 161, Minutes of Hearing of February 17, 1964.

[4]Record Vol. I, pages 18, 21; also unattached Appendix Two (Red Leather Bound) Exhibit V2, page 1. This was its original cost to Precision, that one of the three corporations which were created by the controlling stockholders to buy from them for $3,000,000.00 certain patents and to collect royalties and sales commissions from Den-Nap totalling 45% of gross sales of Den-Nap; Den-Nap, being the original corporation, 5/22 of the stock of which was owned by appellants' clients; Den-Nap also being the entity which alone was obligated to pay 90% of all the debt owed in this reorganization. Den-Nap was actually hopelessly insolvent until the cancellation of all its royalty obligation contracts and debts to Precision, a fact made clear by a careful analysis of the trustee's appraisal. Record Vol. I, pages 22-109.

I have seen show the earnings of Den-Air at all, do they?

"MR. FOURCHER: No sir.

MR. CALHOUN: "Could we – because as much as anybody would want to help, it's impossible to help without accounting for –

"THE COURT: Well, has Precision been getting any dividends, Mr. Trustee? Have you been getting any dividends from Den-Air lately? They are your wholly owned subsidiary, I understand.

"MR. HERTWIG: We have used their money, yes sir.

"THE COURT: You have used their money?

"MR. HERTWIG: No, no. We have used the rent that they pay to Precision. I would like to explain –

"THE COURT: But if they are worth a hundred thousand [sic] [1,000,000.00] and they are on your books at $4,000 maybe they can pay you some dividends. Have you looked into that?

"MR. HERTWIG: Well, they could possibly pay some dividends, yes sir, but they have not paid any. They bear some of the expense of such work as this corporation does for them, and pays them back to the proportion of the amount of work that Den-Nap does for Den-Air, but I don't think Den-Air is worth a million dollars. I think Den-Air's existence depends entirely on the existence of Den-Nap. They use their equipment, rent their equipment through Precision. The people who do business

with Den-Air probably do it because they have the backing of Den-Nap and if they were spun off in any way I don't think they would exist for a long period of time.

"MR. CALHOUN: Your Honor, one thing that would be the most helpful to those who would honestly help and are not in any way attempting to limit the performance of this group, one thing that would help enormously is if this Court would request the Trustee to request his auditor to give us a truly consolidated statement of all of the earnings of all of the owned entities and all of the related entities for each calendar year, by the calendar year. I don't know how much difficulty Mr. Saliba has but I spent, one time, about two weeks attempting to find out from an analysis of their financial statements, and with the help of Mr. Fourcher, who was most kind, and Mr. Dennis and Mr. Emerson, to analyze the earnings of the whole group of entities. The Trustee is doing a magnificent job, his attorney is doing a wonderful job, yet we are all hampered by the obscurity of the earnings and general financial situation of these interlocked entities.

"THE COURT: Well, hasn't he reported on all of it except his Den-Air?

"MR. CALHOUN: Yes sir, but the great difficulty arises out of the different fiscal periods and the different accounting methods used. One of these corporations, for example, is possibly on a calendar year basis with a cash reporting plan. One may be on a fiscal year that begins in July, with an accrual plan of computing its earnings. The third one — I

think cash and accrual are the only possibilities, so I presume the third one has to have one of those all over again, but it's on still another accounting period, which, Your Honor, creates enormous difficulties in trying to determine what amount of money was actually earned in any calendar year period. But if Mr. Fourcher could give us even for this last calendar year an income statement, a consolidated earnings and income statement, profit and loss statement, that would show the earnings of the entire group of corporations, including Den-Air, and any other thing that may be wholly owned, so that Mr. Saliba could be certain —

"THE COURT: Well, are there any other corporations wholly owned? We know about these three and Den-Air. Do they own any others?

"MR. CALHOUN: It has not come to my attention if they do, Your Honor.

"THE COURT: I never heard of any.

"MR. CALHOUN: But Den-Air is an extremely valuable asset.

"THE COURT: Well, I imagine somebody has been making audits for Den-Air down there. Do you do that, Mr. Fourcher?

"MR. FOURCHER: No sir.

"THE COURT: Well, you could get us an audit from whoever makes it, couldn't you?

"MR. FOURCHER: Yes sir.

"MR. MARTIN: Who is Precision Tire Company of Florida, Mr. Fourcher?

"MR. FOURCHER: That is a sales agent.

"MR. MARTIN: Who owns it?

"MR. FOURCHER: I really don't know who owns it.

"THE COURT: It's not owned by our outfits?

"MR. FOURCHER: It's not part of Den-Nap Electric Mold Company or Precision or Poplar Foundries or Den-Air, no.

"THE COURT: Mr. Calhoun, how much did you say you thought maybe Den-Air could be sold for?

"MR. CALHOUN: Well, now, Your Honor, I don't wish the Trustee to misunderstand that I would ever advocate selling that separately, because I think this might be economically unsound, but I believe that Den-Air is possibly worth — the entire Den-Air entity, Den-Air of Miami and these other leaseholds — well, we'll put it this way, Your Honor. It was represented to me by Mr. Clem Dennis, Mr. C. O. Dennis, the president of Den-Nap, that all of these leaseholds, including Atlanta, which was sold before this went into re-organization, that all of these leaseholds were worth in excess of two million dollars. The one in Atlanta was sold for, I believe, two hundred thousand dollars. I have this in correspondence. And, it has been said that Den-Air of Miami was worth a million dollars.[5] . . . . .

[5]Subsequently, the Trustee's appraisal, Record Vol. I, pages 23-109, confirmed that Den-Air assets were worth substantially $1,000,000.00 and produced very substantial earnings. The only annual earning statement produced by the trustee pursuant to

It was immediately after the close of this hearing of February 17, 1964 that Judge W. A. Bootle called in all counsel and announced his intended withdrawal from this Chapter X.

Judge Elliott succeeded to the case, and one year and one month later, during the morning of March 30, 1965 at Columbus, Georgia, he instructed the parties to work out a compromise by 2:00 or he would place the corporations in straight bankruptcy.[6]

Despite the controlling stockholders late consent to an appraisal it will never be known how much more the combined assets were actually worth.

We do not belittle or belabor this fine trustee or his competent attorney, and certainly not the District Courts.[7] The fault is not with any individual man. The

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this request of Judge Bootle covered only that part of the Den-Air earnings from Miami, Florida, which were shown to be $22,538.00 for twelve months ending June 30, 1962. This statement appears as Exhibit GG in the Unattached Appendix One, the Red Leather Volume of Exhibits which is now in this Court's record, and which was also an Exhibit to the Extraordinary Motion in the Circuit Court.

[6]Record Vol. II, pages 87-90.

[7]This situation has arisen from general inattention. Much of the blame must fall on those involved by circumstances in a number of Chapter X's, who have not been able to clearly see or communicate the missing ingredients which so often so greatly reduce the quality of justice and equity accomplished in Chapter X.

Looking back upon the experience of the representation of bondholders trustees, and stockholders from time to time in the Smith Lumber Co., the Douglasville Mill, the Knox-Atlanta, and the 33 Ponce de Leon Corp. Chapter X's in the Northern District of Georgia; the Miller Motor Lines Chapter X in the Middle District of North Carolina; and the Leopard Roofing Co.-Pharris

fault is with the theory that any one man with any title can do this difficult job *alone, without the trial court's aid and concern and participation.* The fault is the lack of thought-out appeals which let the changing facts speak to the Courts, that more realistic theories may be found for better, fairer rulings and results. The fault is the breakdown of communication between the law and the market place.[8] The fault is that a great advance in the complexity of corporate reorganization and the concealment possibilities in the accounting practices of these corporate complexities is not being met by intelligent

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Felt Paper Mill Chapter X in the Southern District of Mississippi, the instant case in the Middle District of Georgia and the Sone-United Southern Companies, Inc. Chapter X now proceeding in the Northern District of Georgia, it is now clear that the degree of concern and desire to comprehend on the part of the Court, and the degree of openness, fairness, and cooperation on the part of the controlling stockholders together determine both the degree of equity and justice accomplished in Chapter X, *and its cost in time and effort.*

[8]It has been said that the most important language for justice to speak in the 20th Century is "accounting" the language it never does speak. This is not true, but we need to take redouble precautions to see that it does not shortly come true in these days in which the complexity of our economic organizations and their computer-powered systems of accounting is multiplying at an almost explosive rate. It may be the time now for this Court to lead the United States Courts in a frontal attack upon the problem of developing the needed procedures and analytical aides, to deal with the increasing complexity of the accounting analyses needed. If need be the Court should have access to a computer center to enable it to cope with the complexities of problems involving accounting with genuine confidence and insight. Accounting practice needs the encounter much more than the Courts, and accounting practice has much to gain from the de-mythologizing that will surely result.

new rules promulgated by this Court requiring some simple, intelligent, and fair yet comprehensive and understandable forms which clearly show *consolidated earnings and assets* of all jointly controlled corporations, and which also show, separately, the net *balance of payments* or ultimate consolidated cash flow between these related corporations.

The faulty result is that today too often our reorganization Courts are overwhelmed by the maize of figures thrown at them just as Judge Bootle was. Unfortunately, too often, the Courts resign from their responsibility to know the facts essential to mete out equity and fairness. Courts do this without realizing that this carries with it the surrender of the Court's great bankruptcy powers to those in control of the reorganization, even though the Court stays physically present throughout.

The correction of this surrender tendency in the lower courts is helped most when this Court acts to insist that there are equitable responsibilities which lower courts must require from controlling stockholders. This Court did just this in its 1965 *American Trailer*[9] pronouncement. *American Trailer* now prevents coerced Chapter XI composition by controlling stockholders before the Chapter X investigation needed to supply the understanding equity requires when secured creditors and many public outside stockholders' rights are affected — at least where S.E.C. is present.

Today this Court has before it another opportunity to fill in and make more explicit this standard of fair play needed from controlling stockholders, as well as the degree of independent understanding that fairness re-

[9]S.E.C. v American Trailer Rental Co., 85 S.Ct. 513, 379 U.S. 594.

quires of the lower courts in reorganization. Here as in *American Trailer,* a composition was coerced before any real understanding of the full extent of the wrongs of the controlling stockholders was accomplished, but here there is an opportunity to correct the attempted penalization of one who tried to prevent it.

The greatest good for that 95 per cent of all reorganizations which are small reorganizations, because 95 per cent of all businesses are small,[10] and the several thousand people affected by them, to the extent of many millions each year, shall grow, slowly, but surely, from the example that this Court may itself set. If this Court will undertake the task of making provisions which will make understandable economic facts behind the accounting veil woven around these multi-corporate debtors, it will strike a blow at the kind of difficulty encountered in today's reorganizations, and the kind of difficulty district courts understandably avoid if possible.

From the statistics of the Administrative office of the United States Courts, it appears that about 2/10,000[11] of the nation's 4,750,000 small businesses[12] and the same fraction of small business assets pass through federal reorganizations each year. Since each of the small non-S.E.C. reorganizations like this one, touch several hundred individuals, these proceedings affect a very significant number of people and control redistribution of a very significant total of assets. As a result the influence

[10]Statement by Bernard L. Botin, Small Business Administrator, before the Senate Select Committee on Small Business March 1, 1967, 10:00 a.m., Table III, as printed and distributed to S.B.A. Regional Directors.

[11]Tables of Bankruptcy Statistics, ending June 30, 1966.

[12]Small Business Administrator's Statement, Table III, Supra.

and effect of unfairness in any given reorganization is more significant than the same degree of unfairness in any ordinary case.

Previously an effort has been made to show the non-existence of any valid or sufficient basis for waiver of appellants' rights in this case under Equity and Chapter X law. We do not now abandon any part of that position; we would even like to further strengthen it with the attached Exhibit B, another piece of correspondence to the trustee's attorney while the matter was still in the trial court's hands.

Since Socrates' trial, to negative in argument a point never really covered in trial, has been acknowledgedly quite difficult. It is for this reason, *in extremis,* we now ask the Court to consider this valid and *positive basis* for the restoration of our rights. The positive contention that:

The result that waiver will produce in this situation is so contrary to the public policy of Chapter X of The Bankruptcy Act and so unconscionable that a Chapter X Court in Equity could not enforce it *after a clear and unequivocal denial of any intent to waive was made and argued in open court before any change in position was made.*

Here appellants did expressly show beyond any possibility of doubt by their fee petition[13] and affidavits[14] served before, and by arguments in open court during

[13]Record Vol. I, pages 110-130.
[14]Record Vol. I, pages 131-139, 140.

the fee hearing in Macon on May 4, 1964,[15] that waiver of their fees was not their intention or their understanding of the Court's desire earlier on March 30, 1964[16] at the plan hearing in Columbus. The statements made and affidavits presented in Macon at the hearing upon compensation for contributions to Chapter X removed the possibility of doubt or misunderstanding on this point. These statements were made before the controlling stockholders had made any payments upon their composition-with-creditors, which itself negatived such a waiver agreement by not setting it out.

Brookhart v. Janis, 86 S.Ct. 1245, 384 U.S. , ____ L. Ed. ____, decided by this Court points to the federal nature of the question of the waiver of federal rights.

> "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is presumption against the waiver of constitutional rights, see, e.g., Glasser v. United States, 315 U.S. 60, 70-71, 62 S.Ct. 457, 464-465, 86 L.Ed. 680, and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461."

> "In deciding the federal question of waiver raised here we must, of course, look to the facts which allegedly support the waiver. Upon an examination of the facts shown in this record, we are completely

[15]Record Vol. I, pages 178-187.

[16]Record Vol. I, pages 234-236.

> unable to agree with the Supreme Court of Ohio that the petitioner *intelligently* and *knowingly* waived his right . . ." (Emphasis added)
>
> *Brookhart v. Janis, supra,* at 1247

Brookhart striking down the invalid waiver of a specific federal constitutional right shows that intentional relinquishment is a logically, as well as equitably, impossible finding where the record shows even one clear contradictory statement, before a change in position.

Nowhere could one find affidavits[17] and statements, given in open court[18] *before any change of position* establishing the absence of an intent to waive Chapter X fee rights any more clearly than those found in this case.

This positive and indisputable lack of knowing or intelligent intent to waive, without more, calls for this Court to prevent the specific enforcement of this waiver in this Chapter X as a matter of Equity and fairness to one who contributed much, neither directly or indirectly receiving fair compensation.

Yet, it is the complete defeat of the public policy in Chapter X of The Bankruptcy Act which will result unless this Court will correct this abusive use of this federal act, which makes it urgent that this Court take jurisdiction of this case.

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[17]Record Vol. I, pages 173 to 177.

[18]Record Vol. I, pages 178 to 187.

GROUND TWO

The denial of certiorari in this instance is a denial of the due process of law in the form of a denial of equity to one whose rights are being extinguished under powers which may not be exercised except in equity and accordance with Chapter X of The Bankruptcy Act.

> "Bankruptcy courts have been variously referred to as courts of equity,[19] courts of equity in essence,[20] virtual courts of equity,[21] courts of equity within a limited field,[22] and the like,[23] . . . for the purpose of emphasizing the applicability of principles of equity in (these cases)."

The denial of petitioners' established 11 U.S.C. 643 rights is held within discretion by the Circuit Court on

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[19]Columbia Foundry Co. v. Lochner (CA4 Md.) 179 F.2d 630, 14 ALR2d 1349; Re Pennsylvania Cent. Brewing Co. (CA3) 135 F.2d 60.

[20]Continental Illinois Nat. Bank & T. Co. v. Chicago, R. I. & P. R. Co. 294 U.S. 648, 79 L.ed 1110, 55 S.Ct. 595; Local Loan Co. v. Hunt, 292 U.S. 234, 78 L.ed 1230, 54 S.Ct. 695, 93 ALR 195; Bardes v. First Nat. Bank, 178 U.S. 524, 44 L.ed 1175, 20 S.Ct. 1000; Stucky v. Masonic Sav. Bank, 108 U.S. 74, 27 L.ed 640, 2 S.Ct. 219; Mason v. Wolkowich (CA1) 150 F. 699.

[21]Re Standard Gas & E. Co. (CA5) 139 F.2d 149, cert. den. 321 U.S. 796, 88 L.ed 1085, 64 S.Ct. 848.

[22]Sylvan Beach v Koch (CA8) 140 F.2d 852.

[23]Courts of bankruptcy are courts of equity and exercise all equitable powers unless prohibited by the Bankruptcy Act. Young v Higbee Co. 324 U.S. 204, 89 L.ed 890, 65 S.Ct. 594.

A bankruptcy court is a court of equity, at least in the sense that in the exercise of the jurisdiction conferred it by the Act it applies principles and rules of equity jurisprudence. Pepper v Litton, 308 U.S. 295, 84 L.ed 281, 60 S.Ct. 238.

the basis of the trial courts' finding that payment of the Section 643 rights of petitioner is included in the composition payment made to petitioners' clients.

There is no legal basis for this holding that the composition payment paid these Section 643 allowances. There is no clause, phrase, or provision of any kind covering release or payment of these allowances in the composition as a whole or in that provision of the composition relating to the payment for petitioners' clients secured debt and stock, which is attached as Exhibit C.

The refusal of petitioners' clients to accept this composition payment as long as it was conditioned upon executing a release reciting that petitioners' II U.S.C. 643 allowances were also paid off by this payment, eliminates implied contract as a basis for such a holding. Moreover, the clear opportunity of the major stockholders to refuse payment if satisfaction of petitioners' allowance was part of their bargain, coupled with their failure to do so, rules out any estoppel as a basis for extinguishing petitioners right.

Petitioners' clients accepted the composition contract and stand by their acceptance as that contract is written, and so do petitioners. The controlling stockholders' attempted to persuade or force petitioners to release their own Section 643 allowances as a condition of their clients being paid. The controlling stockholders failed in this attempt. Petitioners refused to accept payment for their clients until the additional un-contracted-for condition of the extinction of their rights was removed.

The controlling stockholders then elected to fully perform the composition contract, at that time wholly exe-

cutory, in outward conformity with petitioners' understanding, and after express notice that under petitioners understanding that the composition contract did not include payment for petitioners' Section 643 allowances. As a result of this acquiescence in the meaning of the composition contract before its execution any *later reformation,* after execution of the contract to extinguish petitioners' Section 643 allowances as paid by this contract is equitably impossible.

If the issue as to knowledge or foreseeableness is determined against the one seeking reformation in equity, he is not entitled to relief, *Liggett v. Koivunen,* 227 Minn. 114, 34 N.W. 2d 345.

Clearly the extinguishment and discharge of petitioners' II U.S.C. 643 rights on the ground that these rights were paid by the composition payment to petitioners' clients is without any substance of equity or right of law which results in any such a holding being error beyond discretion.

CONCLUSION

Blaise Pascal defined the needs of small reorganizations well when he wrote:

> It is right that what is *just* should be obeyed;
> It is necessary that what is *strongest* be obeyed.
> Justice without might is helpless,
> Might without justice is tyrannical.
> We must then combine justice and might, and
> Make what is just strong; or what is strong, just.[24]

But, in the area of small reorganizations this twain shall never meet until this Court lends its might to that challenging task that others are now avoiding. This case is a good one for this purpose.

JOHN K. CALHOUN
Individually, and as Attorney for
the Estate of C. F. Calhoun

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[24]Pensees, 1670, edited and published as Great Ideas of Western Man, by Container Corporation of America.

CERTIFICATE OF COUNSEL

I, John K. Calhoun, do certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Rule 58 of the Rules of this Court.

/s/ JOHN K. CALHOUN

CERTIFICATE OF SERVICE

I, John K. Calhoun, certify that a copy of this Petition for Re-hearing has been furnished by mail to counsel of record for Charles C. Hertwig, et al; Charles Cork, Paul R. Erwin, Wallace Miller, Jr., Baldwin Martin, Jr., and George Saliba, Esquires, at their respective addresses.

This 31st day of May, 1967.

/s/ JOHN K. CALHOUN

EXHIBIT A

'50-60 $10,000,000.00 Gross

DEN - NAP
(owes $250,000 to Dennis and Mattox; $750,000 to Precision)
Value:
(-550,000.00)
3,750,000.00

POPLAR
owes $377,000 to Precision
Value
(-250,000)

DEN - AIR of FLORIDA
today, 30-40 thousand annual earnings after taxes
today, in Bank, 85,000.00

DEN - AIR of CALIFORNIA
Income ?
Value?
wholly owned operating co.open

Den Nap's 45% gross beginning in 1954

DEN - AIR of FLORIDA today, 30-40 thousand annual earnings after taxes today, in Bank, 85,000.00

DEN - AIR of CALIFORNIA Income ? Value? wholly owned operating company

(Actual retreading operations)

45% gross beginning in 1954 Den Nap's

3,750,000.00

PRECISION

Value:

$1,000,000.00

(still owes 1,500,000.00 to Dennis and Mattox)

1,600,000.00

DEN - AIR LEASING AND LICENSING
(to independent Air-craft re-treaders)

Atlanta*

New York

Tulsa

California

(today, 60-70 thousand net after taxes)

DENNIS - MATTOX

$1,600,000.00 in accumulated income from Precision

$1,600,000.00

*Duke Tire in Atlanta bought its equipment hence does not pay lease rental

EXHIBIT B

May 17, 1965

Mr. Wallace Miller
Miller, Miller & Miller
Persons Building
Macon, Georgia

In re: Den-Nap

Dear Wallace:

What a comedy of errors the denial of fees to Russell, Watkins, and Calhoun is turning out to be.

After learning of your misunderstandings, it is easier to see why the Judge misunderstood that our efforts to get a fee from Den-Nap were simply spite, thought up after the event.

As is completely clear now, we expected and insisted upon a fee long before any mention was made of an attempted reclassification of the Calhoun claim. And, this expectation of a fee, which was clearly brought home to you in our letter of July 3, 1964, is different in amount from our present expectation of a fee simply because a good two-thirds of the work for General Russell, all of the work for Charles Watkins, and three-fourths of my work fell after that fee request of July 3, 1964.

We have not raised our claims for fees for ourselves on account of anything but the greatly increased amount of work done since July, 1964.

We might add that General Russell, my sister, and I all thought that the letters back in 1964 about giving the Calhoun Estate claims less than the amount of their secured creditors claims were just simply old lawyer-type

poker playing. We were certain that Dennis did not want to have to pay anything for Dad's stock. We thought he was making a show about a couple of bucks knocked off the secured creditors' claim to soften us up for a good price on the stock.

This is why in our letter of July 3, 1964, after saying that the creditors' claim was $96,000.00 (ninety six thousand odd dollars), we went on to say:

> "... except for getting the company in the financial bog he got it in, Clem has kept faith with Daddy every step of the way. If Clem will see the Estate is paid, Martha and I and General Russell would want to sell it (the stock) to Clem for $1.00."

So much for why we are now contending for such substantially different attorneys fees and costs than we were contending for in the middle of 1964.

Now for our session on Thursday, March 25, 1965.

If you will recall, I opened up on my telephone call to you from Jackson, Georgia, about 11:15 in the morning as I came to Macon, with the two questions:

"Wallace, how is our purchaser and your plan getting along."

"How about lunch?"

You and your brother were kind enough to wait up lunch for me although I did not get into Macon until nearly 12:30. I met you two in front of the Persons Building as you were headed to the Lanier Hotel for lunch.

All through lunch we talked about the possibility of

the Super Mold Corporation making a bid in the manner you desired.

A large part of the time was spent kidding you about writing up the Plan for the Creditors' Committee and trying to highjack our Purchaser — all for the common good, of course.

If you will recall, we spent some little time on what I considered to be the inadequacy in the Creditors' Committee's Plan which Martin and Saliba had said you had written. Then as now, in my estimation it gave no fair means of evaluating the subordinated (if not eliminated) claims of Dennis and Mattox and the Den-Nap stockholders.

I told you that I felt if we wanted to get a Plan approved that would stand the test of objection and appeal, we had better either consolidate our plan's competitive sale feature into your plan for the Creditors' Committee or use our plan, dubbed by the Court as the Calhoun Plan.

If I am not mistaken, we had gotten back to your office by this time in this discussion. At any rate, we were back in your office when I asked you since I had furnished the purchaser did you not think I was entitled to a fee whatever plan we used to consummate a sale to Super Mold, because, of course, having a purchaser was more important than having a plan.

You said you felt that I was entitled to a fee for having come up with a purchaser, but that I was not entitled to any stock in the new company also, and Super Mold was objecting to my request for stock.

Then,

(and this is quite clearly the point at which the misunderstanding between you and me arose)

I told you that if you had no objection I wanted to take the fee in stock if Super Mold would go along with it because very probably the children would get little or no money for their stock and if I could take the fee in stock in the new company to be organized, I could conceivably keep the children from losing the value of their stock and I might be able to give them the stock I received as a fee without as great a tax disadvantage as there would otherwise be.

I told you that though I was a poor struggling-type that it appeared that we might have to sell a piece of land that we had as a law fee for the right-of-way for I-75 over back of Broadview Shopping Center and that I thought it would be a good thing for me to get my fee in stock in order that the children would not only have the benefit of the debt claim of substantially $100,000 tax free, *but that also the children would not have to lose their stock interest or even roll it ever into cash and back into some other investment where it would be reduced by the amount of the taxes owed.*

In short, I told you my desire was to get the children their $100,000 cash from the debt claim which is nontaxable in their situation *and take compensation for their stock claims and for my fee in stock if this be possible.*

As you noted, Super Mold was not happy with this. It probably could not have been done with Super Mold

and to say the least it does not now appear to be possible to do this with Den-Nap.

(However, except for the fact that $12,000 may well be too little to fool with from Den-Nap, I would be equally happy to take my fee in Den-Nap stock provided it was 7 per cent preferred stock or subject to some guaranteed plan of annual repurchase.)

At this point our conversation was interrupted by your 2:00 appointment. The pressure of getting the eight copies of our Exhibits to Calhoun vs. Dennis and Mattox bound kept me so busy while I was in Macon we never were able to finish that conversation.

However, I left thinking that it was clear in your mind:

1. We wished and thought we deserved a fee for our contribution.

2. You agreed.

Wallace, I regret your lack of understanding of all that I said, but everything I said to you Thursday, March 25, 1965, from twelve-thirty to two o'clock or five minutes afterward, was in the vein of "We have done an enormous amount of work and we expect a fee."

The only variation on this simple, direct message was "We would appreciate it if the fee can be paid in stock along with the compensation for the children's stock claim which we wanted to see paid in stock."

Very truly yours,
JOHN K. CALHOUN

JKC/bbt
cc: General H. D. Russell
Charles Watkins

EXHIBIT C

ARTICLE V

CLAIMS TO BE PAID IN CASH IN FULL

The claim included in class 1 is to be paid in cash in full, with interest as called for in the note and deed to secure debt to the date of payment.

(End of page 3 of controlling stockholders second plan R, Vol. I, p. 357)

(Beginning of page 4 of controlling stockholders second plan, R. Vol. I, p. 358)

The claim included in class 2 is to be paid in full a total of $98,724.15 in cash. The sum of $72,300.00 shall be paid said claimant by the Trustee from the assets in his hands. The sum of $26,424.15 shall be paid claimant by the holders of general claims, the same to be disbursed for the accounts of said claimants by the Trustee from assets in his hands. Upon consumation and distribution hereunder, the Estate of C. F. Calhoun will dismiss with prejudice any and all claims it or any beneficiary of it has against Den-Nap, Polar, Precision, Dennis, Mattox and Retreating. In addition, it will cause to be delivered for cancellation the certificate issued in the name of C. F. Calhoun representing five shares of the common capital stock of Den-Nap, and deliver the Calhoun patents.